

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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PERRY KIRK,

Plaintiff,

Case No. 1:16-cv-1350

v.

Honorable Paul L. Maloney

SHERRY BURT et al.,

Defendants.

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**OPINION**

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Under the Prison Litigation Reform Act, PUB. L. NO. 104-134, 110 STAT. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, Plaintiff's action will be dismissed for failure to state a claim.

**Factual Allegations**

Plaintiff Perry Kirk presently is incarcerated at the Muskegon Correctional Facility (MCF). He sues the following MCF officials: Warden Sherry Burt; Classification Director Roger Kitchen; Grievance Coordinator Loretta Barnes; Food Services Director Charles Balling; and Assistant Food Services Director Ron Eckert.

On January 25, 2016, Plaintiff received a non-job-related, Class-II misconduct for destruction of state property in the amount of \$1.05. On February 3, 2016, he was found guilty and orally informed that he would be sanctioned with five days' toplock and 20 days' loss of privileges. He also was ordered to pay restitution in the amount of \$1.05. Plaintiff subsequently learned that the sanctions were to start on February 6 and end of February 11, 2016. Plaintiff was scheduled to have time off on February 6 and 7, and he was supposed to report back on February 8, 2016. He alleges that he received the paperwork for the sanctions on February 10, so he did not work that day. On February 11, however, he reported to work.

When Plaintiff arrived in food service on February 11, 2016, he was advised by food service staff that, because he had been on toplock for five days, he would be terminated from the job. Plaintiff complains, however, that he did not miss five days of work, because he was scheduled to be off work for the first two days. Although he left work in response to the order, he assumed that Defendant Classification Director Roger Kitchen would see the error in the termination. Kitchen allegedly failed to perform his duties, however, so Plaintiff's discharge was upheld. Plaintiff, however, did not receive paperwork until March 10, 2016. On that same date, Plaintiff received a Work Assignment Evaluation

Report, in which Defendants Balling and Eckert recommended his dismissal from his position because he had missed five consecutive days of work.

Plaintiff complains that his delayed receipt of the work report demonstrates that the report was backdated, in order to belatedly justify the termination. He asserts that the action amounts to the creation of a false report and violates prison policy and due process. Plaintiff also contends that the negative work report and request for discharge was retaliatory, because in 2014, Plaintiff complained about Defendant Eckert to then-Food Service Director Eddy. Finally, Plaintiff contends that another prisoner, Prisoner Everest, was treated differently in similar circumstances. Everest also received five days' toplock for a non-work misconduct. Everest worked three of his toplock days, whereas Plaintiff worked only two of his toplock days. Everest was not discharged from his job. Plaintiff contends that Everest was treated differently because there existed no false or backdated work documents.

For relief, Plaintiff seeks compensatory and punitive damages, together with an injunction permanently enjoining Defendants from violating Plaintiff's due process rights and ordering that Plaintiff be returned to his job assignment.

### **Discussion**

#### **I. Failure to state a claim**

A complaint may be dismissed for failure to state a claim if it fails “to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a “probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)); see also *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

#### **A. Supervisory Liability**

Plaintiff’s sole allegation against Defendants Burt and Barnes are that they failed to properly review and resolve his grievances.

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Iqbal*, 556 U.S. at 676; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691(1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575-76 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. *Grinter*, 532 F.3d at 576; *Greene*, 310 F.3d at 899; *Summers v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004). Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). “[A] plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676. Plaintiff has failed to allege that Defendants Burt and Barnes engaged in any active unconstitutional behavior. Accordingly, he fails to state a claim against them.

## **B. Due Process**

Plaintiff contends that he was discharged in violation of prison policy and due process. The elements of a procedural due process claim are: (1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process. *Women’s Med. Prof’l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). The Sixth Circuit has consistently found that prisoners have no constitutionally protected liberty interest in prison employment under the Fourteenth Amendment. *See, e.g., Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001) (district court properly dismissed as frivolous the plaintiff’s claim that he was fired from his prison

job); *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989) (no constitutional right to prison employment); *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987) (“[N]o prisoner has a constitutional right to a particular job or to any job”); *Carter v. Tucker*, No. 03-5021, 2003 WL 21518730, at \*2 (6th Cir. July 1, 2003) (same). Moreover, “as the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates.” *Carter*, 2003 WL 21518730 at \*2 (citing *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991), and *James v. Quinlan*, 866 F.2d 627, 629-30 (3d Cir. 1989)). Under these authorities, Plaintiff fails to state a due process claim arising from the termination of his prison employment.

Moreover, Defendants’ alleged failures to comply with an administrative rule or policy do not themselves rise to the level of a constitutional violation. *Laney v. Farley*, 501 F.3d 577, 581 n.2 (6th Cir. 2007); *Brody v. City of Mason*, 250 F.3d 432, 437 (6th Cir. 2001); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992); *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992); *McVeigh v. Bartlett*, No. 94-23347, 1995 WL 236687, at \*1 (6th Cir. Apr. 21, 1995) (failure to follow policy directive does not rise to the level of a constitutional violation because policy directive does not create a protectible liberty interest). Section 1983 is addressed to remedying violations of federal law, not state law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); *Laney*, 501 F.3d at 580-81.

For these reasons, Plaintiff fails to state a due process claim against Defendants Balling and Eckert for recommending his discharge and Defendant Kitchen for approving that discharge.<sup>1</sup>

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<sup>1</sup>Plaintiff’s claim against Defendant Kitchen fails for an additional reason. “[P]rocedural due process prohibits arbitrary and unfair deprivations of protected life, liberty, or property interests without procedural safeguards.” *Howard v. Grinage*, 82 F.3d 1343, 1349-50 (6th Cir. 1996) (citing *Daniels v. Williams*, 474 U.S. 327 (1986)). A claim of negligence is insufficient to support a § 1983 claim. *Daniels*, 474 U.S. at 333-36. Instead, to state a procedural due process claim, a plaintiff must allege a constitutionally arbitrary deprivation. *Id.*; *Howard*, 82 F.3d at 1350 (“[A]rbitrary in the

### C. Retaliation

Plaintiff next suggests that his termination from his work was motivated by Plaintiff having complained to Eckert's supervisor about Eckert's treatment of Plaintiff. Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). In order to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Id.* Moreover, a plaintiff must be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

The filing of a prison grievance is constitutionally protected conduct for which a prisoner cannot be subjected to retaliation. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001); *Hall v. Nusholtz*, No. 99-2442, 2000 WL 1679458, at \*2 (6th Cir. Nov. 1, 2000); *Burton v. Rowley*, No. 00-1144, 2000 WL 1679463, at \*2 (6th Cir. Nov. 1, 2000). The Court will assume without deciding that Plaintiff's complaint to Defendant Eckert's supervisor amounted to protected conduct. Moreover, the Court has little difficulty determining that a termination a prison work assignment amounts to adverse action within the meaning of *Thaddeus-X*, 175 F.3d at 394.

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constitutional sense' for procedural due process purposes means conduct undertaken with something more than negligence." To state a claim based on the deprivation of procedural due process, the "conduct must be grossly negligent, deliberately indifferent, or intentional." *Howard*, 82 F.3d at 1350. At best, Plaintiff's allegations against Defendant Kitchen support a claim that Kitchen was negligent in reviewing the accuracy of the report issued by Defendants Eckert and Balling.

Nevertheless, Plaintiff's allegations concerning causation fall far short of demonstrating that the actions taken by Eckert or Balling were motivated by Plaintiff's protected conduct in 2014. In limited circumstances, temporal proximity "may be 'significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive.'" *Muhammad v. Close*, 379 F.3d 413, 417-18 (6th Cir. 2004) (quoting *DiCarlo v. Potter*, 358 F.3d 408, 422 (6th Cir. 2004)). However, "[c]onclusory allegations of temporal proximity are not sufficient to show a retaliatory motive." *Skinner v. Bolden*, 89 F. App'x 579, 580 (6th Cir. 2004).

Moreover, *Muhammad* does not stand for the proposition that temporal proximity alone is sufficient to create an issue of fact as to retaliatory motive.

In *Muhammad* the Sixth Circuit did not resolve the issue, but merely observed that "temporal proximity alone **may be** 'significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive.'" *Id.* at 418 (quoting *DiCarlo v. Potter*, 358 F.3d 408, 422 (6th Cir. 2004) (emphasis added). Even if temporal proximity may in some cases create an issue of fact as to retaliatory motive, it would only be sufficient if the evidence was "significant enough." Plaintiff's conclusory and ambiguous evidence is not "significant enough" to create an issue of fact as to retaliatory motive.

*Brandon v. Bergh*, 2010 WL 188731, slip op. at 1 (W.D. Mich., Jan. 16, 2010).

Here, Plaintiff alleges no more than that he complained about Defendant Eckert in 2014, more than a year before his employment was terminated. His allegations therefore do not even suggest that the action was temporally proximate. Under these circumstances, the temporal link between the events is so attenuated that no inference of retaliation can arise, much less the sort of strong inference required by *Muhammed*, 379 F.3d at 417-18.



Moreover, even assuming that Eckert had some retaliatory motive, Eckert did not make the final decision. In fact, although Eckert completed the work assignment evaluation, Defendant Balling approved the request for termination. (Work Assisnment Evaluation, ECF No. 1-1, PageID.10.) In addition, Defendant Kitchen determined that the requested action was appropriate and terminated Plaintiff's prison employment. (Compl., ECF No. 1, PageID.4.) A defendant's statements or conduct are not evidence of retaliation if the defendant is not the decisionmaker taking the alleged adverse action. *Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2001); *Shehee v. Luttrell*, 199 F.3d 295, 301 (6th Cir. 1999). Further, Plaintiff makes no allegation that Defendants Balling and Kitchen acted with a retaliatory motive or were even aware that Plaintiff had previously complained about Defendant Eckert.

In sum, Plaintiff's allegations utterly fail to demonstrate the third prong of the *Thaddeus-X* test for retaliation. *Thaddeus-X*, 175 F.3d at 394.

#### **D. Equal Protection**

Although Plaintiff does not directly invoke the Equal Protection Clause, his allegations suggest that he believes that he was treated differently than Prisoner Everest. The Equal Protection Clause commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S.CONST. amend. XIV, § 1. A state practice generally will not require strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Plaintiff does not suggest that he is a member of a suspect class, and "prisoners are not considered a suspect class for purposes of equal protection litigation." *Jackson v. Jamrog*, 411 F.3d 615, 619 (6th Cir. 2005); *see also Wilson v. Yaklich*, 148 F.3d 596, 604 (6th

Cir.1998). In addition, as earlier discussed, prisoners do not have a fundamental right to prison employment.

Because neither a fundamental right nor a suspect class is at issue, Plaintiff's claim is reviewed under the rational basis standard. *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006). "Under rational basis scrutiny, government action amounts to a constitutional violation only if it 'is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.'" *Id.* (quoting *Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005)). To prove his equal protection claim, Plaintiff must demonstrate "intentional and arbitrary discrimination" by the state; that is, he must demonstrate that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (discussing "class-of-one" claims where no suspect class or fundamental right is alleged).

The Supreme Court recently has recognized that rational basis scrutiny is not properly applied to class-of-one claims involving employment decisions and other discretionary decisionmaking:

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

*Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 603 (2008). Here, as in *Engquist*, Plaintiff challenges an employment decision under rational basis scrutiny. *Engquist* bars such a claim. *Id.*

Moreover, Plaintiff fails to demonstrate that Prisoner Everest was similarly situated To be a similarly-situated person member of another class, “the comparative [prisoner] ‘must have dealt with the same [decisionmaker], have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or their employer’s treatment of them for it.’” *Umani v. Mich. Dep’t of Corr.*, 432 F. App’x 453, 460 (6th Cir. 2011) (citing *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003)); *see also Davis v. Prison Health Servs.*, 679 F.3d 433, 440 (6th Cir. 2012). In the instant case, Plaintiff directly acknowledges that Prisoner Everest was not similarly situated in all relevant respects. Instead, by Plaintiff’s own admission, Prisoner Everest missed only two consecutive days of work on a five-day sanction, whereas Plaintiff missed three consecutive days of work. (Compl., ECF No. 1, PageID.6.)

For both reasons, therefore, Plaintiff’s equal protection claim will be dismissed.

### **Conclusion**

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiff’s action will be dismissed for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c).

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should Plaintiff appeal this decision, the Court will assess the \$505.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless Plaintiff is barred from proceeding *in*

*forma pauperis*, e.g., by the “three-strikes” rule of § 1915(g). If he is barred, he will be required to pay the \$505.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

A Judgment consistent with this Opinion will be entered.

Dated: December 14, 2016

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge